

CCRB INVESTIGATIVE RECOMMENDATION

Investigator: Jessica Peña	Team: Team # 1	CCRB Case #: 200407046	<input checked="" type="checkbox"/> Force	<input checked="" type="checkbox"/> Discourt.	<input type="checkbox"/> U.S.
			<input checked="" type="checkbox"/> Abuse	<input type="checkbox"/> O.L.	<input type="checkbox"/> Injury
Incident Date(s) Thursday, 07/15/2004 5:30 PM	Location of Incident: § 87(2)(b) Hallway	Precinct: 44	18 Mo. SOL 1/15/2006	EO SOL 1/15/2006	
Date/Time CV Reported Wed, 07/21/2004 12:34 PM	CV Reported At: CCRB	How CV Reported: Phone	Date/Time Received at CCRB Wed, 07/21/2004 12:34 PM		

Complainant/Victim	Type	Home Address
§ 87(2)(b)	§ 87(2)(b)	§ 87(2)(b)
§ 87(2)(b)	§ 87(2)(b)	§ 87(2)(b)

Subject Officer(s)	Shield	TaxID	Command
1. POM Cedric Green	15885	926907	044 PCT
2. SGT Osvaldo Nunez	03579	918086	044 PCT
3. Officers			

Witness Officer(s)	Shield No	Tax No	Cmd Name
1. POM Alejandr Olan	12063	920678	044 PCT

Officer(s)	Allegation	Investigator Recommendation
A.SGT Osvaldo Nunez	Abuse: Sgt. Osvaldo Nunez authorized the stop and search of § 87(2)(b)	§ 87(2)(b)
B.SGT Osvaldo Nunez	Force: Sgt. Osvaldo Nunez used physical force against § 87(2)(b)	§ 87(2)(b)
C.POM Cedric Green	Force: PO Cedric Green used physical force against § 87(2)(b)	§ 87(2)(b)
D.SGT Osvaldo Nunez	Force: Sgt. Osvaldo Nunez struck § 87(2)(b) with a nightstick.	§ 87(2)(b)
E.SGT Osvaldo Nunez	Force: Sgt. Osvaldo Nunez used physical force against § 87(2)(b)	§ 87(2)(b)
F.SGT Osvaldo Nunez	Force: Sgt. Osvaldo Nunez struck § 87(2)(b) with a nightstick.	§ 87(2)(b)
G.SGT Osvaldo Nunez	Discourtesy: Sgt. Osvaldo Nunez spoke obscenely and/or rudely to § 87(2)(b) and § 87(2)(b)	§ 87(2)(b)
H.POM Cedric Green	Discourtesy: PO Cedric Green spoke obscenely and/or rudely to § 87(2)(b)	§ 87(2)(b)
I.SGT Osvaldo Nunez	Force: Sgt. Osvaldo Nunez used pepper spray against § 87(2)(b)	§ 87(2)(b)
J. Officers	Force: Officers used physical force against § 87(2)(b) and § 87(2)(b)	§ 87(2)(b)

Synopsis

On July 21, 2004, § 87(2)(b) contacted the CCRB to file a complaint against officers from the 40th precinct. She stated that on July 15, 2004, she was in her apartment when she heard her son § 87(2)(b) screaming for her in the hallway. When she opened the door she saw two males in plainclothes, later identified as Sgt. Osvaldo Nunez and PO Cedric Green, allegedly beating her son [Allegations B and C]. Sgt. Nunez pulled out his nightstick and put it across § 87(2)(b)'s chest [Allegation D]. § 87(2)(b) attempted to assist her son, who was being kicked and punched by PO Green, but was pushed back inside her apartment by Sgt. Nunez [Allegation E] and hit on her hand with his nightstick [Allegation F]. Both officers called § 87(2)(b) a “motherfucker” throughout the incident and Sgt. Nunez called § 87(2)(b) a “vieja alcahueta,” translated as old gossip [Allegations G and H]. § 87(2)(b) and § 87(2)(b) were handcuffed, and a call was placed for officer assistance. Uniformed officers whom responded allegedly slammed both § 87(2)(b) and § 87(2)(b) into the wall as they were being escorted to the patrol car [Allegation J].

Upon interviewing Sgt. Nunez, it was determined that § 87(2)(b) ran inside the building after being stopped and searched outside of the building [Allegation A]. Additionally, upon interviewing § 87(2)(b) it was determined that he was pepper sprayed by Sgt. Nunez [Allegation I].

§ 87(2)(b), § 87(2)(g)

Summary of Complaint

§ 87(2)(b) was interviewed in Spanish by the CCRB on August 16, 2004 in her apartment located at § 87(2)(b) § 87(2)(b) (encl. 5a-e). § 87(2)(b) is a § 87(2)(b) § 87(2)(b) and lives with her son § 87(2)(b) who is § 87(2)(b) old.

On July 15, 2004, § 87(2)(b) gave her son, § 87(2)(b) thirteen dollars to play lottery numbers at the grocery store. As she waited for him to return, she heard § 87(2)(b) yelling in the hallway that there were two men who were killing him. When § 87(2)(b) opened the front door, she saw two men in plainclothes, later identified as Sgt. Osvaldo Nunez and PO Cedric Green, on top of § 87(2)(b) punching him. § 87(2)(b) was face down on the floor outside of her apartment door, while Sgt. Nunez had his leg on § 87(2)(b)'s back. Sgt. Nunez was lifting § 87(2)(b)'s upper body with his nightstick across § 87(2)(b)'s chest. PO Green punched § 87(2)(b) in his face for “approximately fifteen minutes.” § 87(2)(b) pleaded to them not to hit her son because he had an injured back. This seemed to anger Sgt. Nunez who then pushed § 87(2)(b).

§ 87(2)(b) into the wall, and hit her on the hand with his nightstick. Both officers cursed and yelled out “motherfucker” and Sgt. Nunez called § 87(2)(b) a “vieja alcahueta,” translated as old gossip. § 87(2)(b) ran inside her apartment and called 911. When she ran back to the hallway, Sgt. Nunez presented her his shield, which was around his neck and told her that they were police officers. Both officers continued to hit § 87(2)(b) for approximately ten minutes, and then handcuffed him and § 87(2)(b).

Uniformed officers responded to the building, and immediately grabbed § 87(2)(b) slammed him against the wall and punched him in the face. Uniformed officers also grabbed § 87(2)(b) and started beating her as well. § 87(2)(b) was unable to describe any of the uniform officers who allegedly assaulted her and § 87(2)(b) was handcuffed and transported to the 44th Precinct. § 87(2)(b) admitted to seeing a crack pipe on the ground of the entranceway of the building, and she picked it up and tucked it inside her shirt, which was later recovered at the precinct. § 87(2)(b) later informed her that officers continued to beat him in the precinct and tell him he was garbage.

Results of Investigation

§ 87(2)(b) was interviewed by the CCRB on August 16, 2004 (encl. 4a-d). § 87(2)(b) is § 87(2)(b). § 87(2)(g)

On July 15, 2004 at approximately 5:30pm, § 87(2)(b) returned home after playing lottery for his mother. § 87(2)(b) entered the building, and walked down towards his apartment located at the end of the corridor when he heard the entrance door to the building slam open. § 87(2)(b) saw two men in plainclothes, Sgt. Nunez and PO Green, enter the building and walk towards him. § 87(2)(b) did not believe they were officers since they did not have their shields displayed. Both officers cornered § 87(2)(b) in the narrow hallway, and began punching him in the head and pushing him towards the wall. Sgt. Nunez then grabbed § 87(2)(b) from behind as § 87(2)(b) attempted to pull away and walk towards his apartment. He yelled for his mother to help him, and when she opened the door, Sgt. Nunez hit her. § 87(2)(b) could not recall where she was hit due to the fact he was engaged in a struggle. PO Green continued to hold § 87(2)(b) against the wall. § 87(2)(b) tried to push the officers out of the way to get to § 87(2)(b). The officers brought § 87(2)(b) to the floor, handcuffed him, and then Sgt. Nunez pepper sprayed him.

Uniformed officers entered the building, and an officer lifted § 87(2)(b) from the floor, and slammed him against the wall. § 87(2)(b) was unable to provide a description of this officer. Though § 87(2)(b) initially stated that he had a crack pipe on his person, he later revised his testimony and stated that the crack pipe was inside a potted plant in the hallway by his apartment door. He added that it fell out of the potted plant during the struggle and § 87(2)(b) picked it up for him. § 87(2)(b) denied having possession of the crack pipe at any time during the incident.

PO Alejandro Olan

PO Alejandro Olan was interviewed by the CCRB on November 3, 2004 (encl. 7a-d). On July 15, 2004 PO Olan worked a 1:00pm to 9:35pm tour. PO Olan was dressed in plainclothes and worked with Sgt. Nunez and PO Green. PO Olan was assigned to the observation post alone on foot. He did not have any memo book entries in regards to this incident.

On July 15, 2004 at approximately 5:30pm, PO Olan was standing on the northeast corner of 169th Street and the Grand Concourse. PO Olan was making observations for

approximately an hour into the vestibule and lobby of § 87(2)(b), which is under the clean halls affidavit since it is a drug-prone location. He was not using any equipment in making his observations since he was standing on the street in daylight. PO Olan saw numerous people enter the building and speak to an unidentified male for a few seconds and leave. PO Olan could not provide a description of this male. PO Olan believed that this male was the dealer in narcotics transactions.

PO Olan saw § 87(2)(b) enter the lobby, approach the seller, and immediately exit. PO Olan, who was positioned across the street from the location, immediately recognized § 87(2)(b) from a prior arrest approximately three months earlier for heroin and resisting arrest. This was the second time that day that § 87(2)(b) had entered the building. Though PO Olan never saw a hand to hand exchange, he believed that § 87(2)(b) was supplying the dealer with contraband. § 87(2)(b) walked into the lobby for only two minutes, before exiting the building, followed by the dealer. § 87(2)(b) walked northbound on the Grand Concourse, and PO Olan lost sight of the dealer. PO Olan immediately put § 87(2)(b)'s description and direction of flight via point to point radio to PO Green. PO Green followed § 87(2)(b) westbound onto 169th Street but lost visual of him. PO Olan never heard a request for officer assistance over the radio, but later saw numerous units respond to the location. When he changed the channel of his radio, he heard that PO Green called for assistance. PO Olan never assisted in the arrests.

Sgt. Osvaldo Nunez

Sgt. Nunez was interviewed by the CCRB on October 28, 2004 (encl. 6a-e). On July 15, 2004, Sgt. Nunez worked a 12:30pm by 9:27pm tour. He was assigned as the SNEU supervisor and worked with PO Cedric Green, and PO Santos Rivera. PO Rivera remained in the vehicle and was not involved in the apprehension. All officers were in plainclothes and assigned to an unmarked vehicle and operating over point to point radio.

On July 15, 2004, Sgt. Nunez was conducting a SNEU operation with his field team. He stated that an officer was posted on the rooftop of a building making observations into § 87(2)(b). Sgt. Nunez did not know the exact location of where observations were being made, nor did he know which officer was making these observations. Sgt. Nunez remained in the apprehension car with PO Green and PO Rivera. When presented with the roll call for the date of the incident, Sgt. Nunez was certain that PO Danilo Mercik, PO Juan Mora, and PO Alejandro Olan were part of the SNEU team.

The observation post, later identified as PO Olan, radioed to Sgt. Nunez a description of § 87(2)(b) and his direction of flight. PO Olan stated that § 87(2)(b) was seen entering the location several times, and speaking to the seller. Sgt. Nunez believed that § 87(2)(b) either had a cane or walked with a limp. § 87(2)(b) was one of many individuals observed with the seller however it was unclear if he purchased narcotics or supplied the dealer with contraband. Sgt. Nunez stated that he did not recall if the observation officer specified where narcotics were placed, and attributes that to § 87(2)(b) being the supplier.

Sgt. Nunez and PO Green exited their vehicle and stopped § 87(2)(b) as he was about to enter the side entrance of § 87(2)(b) located on 169th Street. § 87(2)(b) was the only individual headed in the direction of flight, who fit the description provided by the observation post. Both officers identified themselves with their shields and placed § 87(2)(b) against the wall, just right of the doorway. PO Green searched § 87(2)(b)'s pockets as Sgt. Nunez held § 87(2)(b)'s arm for approximately five seconds before § 87(2)(b) bolted through the doorway. Sgt. Nunez then revised his statement and said that he was not certain where PO Green searched since they searched several individuals that day in regards to this incident.

As § 87(2)(b) ran into the building, Sgt. Nunez grabbed hold of his waist and tried to pull him down to the floor. PO Green attempted to bring § 87(2)(b)'s upper body down by pulling him from his shoulders. § 87(2)(b) dragged both officers to the end of the twenty-foot hallway. § 87(2)(b) screamed for his mother, and Sgt. Nunez deduced that he lived in the apartment at the end of the hallway. When § 87(2)(b) exited her apartment she attempted to pull § 87(2)(b) inside her apartment. Since they were in plainclothes, Sgt. Nunez presented his shield and identified himself as an officer in Spanish. § 87(2)(b) continued to pull § 87(2)(b) into the apartment while hitting Sgt. Nunez and PO Green on their arms and back, and pulling Sgt. Nunez' arm off of § 87(2)(b). Sgt. Nunez then pushed § 87(2)(b) on her shoulder into her apartment, and she went inside and grabbed a telephone. When § 87(2)(b) returned she continued to pull § 87(2)(b).

The struggle lasted approximately five minutes before Sgt. Nunez ordered PO Green to request officer assistance. § 87(2)(b) never hit the officers, but he would not allow them to handcuff him and was dragging them towards his apartment. The officers continued to struggle with § 87(2)(b) as they waited for officer assistance. Half of § 87(2)(b)'s body was beyond the threshold of the apartment and the officers were attempting to pull him towards the front door and away from the apartment since they did not know if he had a weapon in the apartment. When § 87(2)(b)'s body was almost flat against the floor, Sgt. Nunez pepper sprayed him since he did not believe there was any other alternative.

Sgt. Nunez stated that both he and PO Green were rolling around with him and could not state whether he made contact with his chest but denied putting him in a chokehold. The officers and § 87(2)(b) were bouncing off the wall due to the struggle. Sgt. Nunez denied ever kicking or punching § 87(2)(b). At no point did PO Green have physical contact with § 87(2)(b) but Sgt. Nunez recalled that he did sustain an injury from her. It took about ten minutes for uniformed officers to arrive since both Sgt. Nunez and PO Green were unaware of the building number. Uniformed officers that responded transported § 87(2)(b) to the precinct. Sgt. Nunez was not sure who recovered the crack pipe from § 87(2)(b) but stated that PO Green did have it in his possession at the precinct. Sgt. Nunez admitted that he and PO Green used profanity throughout the incident to get § 87(2)(b) to comply since it was a "pretty fierce struggle." However, he denied using profanity against § 87(2)(b). Since he was in plainclothes, Sgt. Nunez did not have his nightstick with him. He stated that since he has not received special training in regards to an asp, he would not have had one with him. He also stated that PO Green does not carry an asp.

Due to an extensive military leave, PO Green was not interviewed. His memobook was unavailable and therefore not included in the file.

As per conferral with supervision, based on officer testimony and the fact that neither civilians could provide a detailed description of the uniformed officers, it was determined that no further investigative steps would be taken or were necessary.

Photographs

The photos presented by § 87(2)(b) show a swollen right hand as compared to her left hand. The photos of § 87(2)(b) show that his right cheek is swollen (encl. 5c-d).

Police Documents

The **SPRINT** (encl. 8a-d) indicates that it took seven minutes for officers to respond to the location. The **communications CD** (encl. in file) verifies that there was clear confusion as to the address. The **command log** (encl. 10a-h) documented that § 87(2)(b) and § 87(2)(b) were

logged in at 6:10pm, and indicated that § 87(2)(b) had a swollen right cheek. The **omniform system of complaints** (encl. 11a-b) indicates that § 87(2)(b) was charged with criminal possession of a controlled substance. The narrative indicated that § 87(2)(b) was in possession of a crack pipe, refused to be handcuffed, and unlawfully entered a clean halls building. The **arrest photo** shows that § 87(2)(b) does have small bruises to his face and a swollen right cheek (encl. 13). The **property voucher** (encl. 12) form for § 87(2)(b) indicates that one crack pipe with alleged crack residue was recovered. The **arrest report** (encl. 15a-e) indicates that § 87(2)(b) was charged with obstruction of governmental administration, resisting arrest, and disorderly conduct.

Officer and Civilian CCRB History

§ 87(2)(b) and § 87(2)(b) have no prior CCRB complaints on file. Sgt. Nunez has a total of five prior CCRB complaints consisting of fifteen allegations in his eight-year tenure with the NYPD (encl. 2a-b). He had one allegation, which was substantiated by the CCRB, but he was found not guilty by the DCT. PO Green has one prior complaint consisting of two allegations in his four-year tenure with the NYPD (encl. 2c). PO Green does not have any substantiated allegations.

§ 87(2)(b)

[REDACTED]

Conclusions and Recommendations

It is undisputed that § 87(2)(b) attempted to enter his mother's apartment as Sgt. Nunez and PO Green were struggling with him in the hallway. It is also undisputed that Sgt. Nunez pushed § 87(2)(b) and pepper sprayed § 87(2)(b).

§ 87(2)(b), § 87(2)(g)

[REDACTED]

§ 87(2)(b), § 87(2)(g)

[REDACTED]

§ 87(2)(b), § 87(2)(g)

§ 87(2)(b), § 87(2)(g)

§ 87(2)(b), § 87(2)(g)

Allegation A: Abuse of Authority: Sgt. Osvaldo Nunez authorized the stop and search of

§ 87(2)(b)

Though § 87(2)(b) never offered any statements that he was stopped by officers, it was determined that Sgt. Nunez authorized the stop of § 87(2)(b) based on the information provided to him by the observation post, PO Olan § 87(2)(g).

According to Kamins' Search and Seizure, (encl. 1a) for a person to be stopped, "the officer must reasonably suspect that such person ...has committed a crime." Reasonable suspicion can be defined as "the quantum of knowledge sufficient to induce an ordinarily prudent and cautious man under the circumstances to believe criminal activity is at hand." PO Olan testified that he radioed to Sgt. Nunez that he observed § 87(2)(b) entering the location under investigation and speaking to the dealer § 87(2)(b), § 87(2)(g).

§ 87(2)(g)

Allegation B: Force: Sgt. Osvaldo Nunez used physical force against § 87(2)(b)

Allegation C: Force: PO Cedric Green used physical force against § 87(2)(b)

Allegation E: Force: Sgt. Osvaldo Nunez used physical force against § 87(2)(b)

Both civilians alleged that § 87(2)(b) was punched in the head, and pushed against the wall. Sgt. Nunez did not deny that both he and PO Green used physical force in an attempt to restrain § 87(2)(b). Based on the investigation, it was determined that both Sgt. Nunez and PO Green attempted to restrain § 87(2)(b) who was fleeing, by grabbing him, pulling him to the floor, and pushing him against the wall. According to New York State Penal Law 35.30, (encl. 1b-c) while effecting an arrest or attempting to prevent escape from custody a police officer “may use physical force when and to the extent he reasonably believes such to be necessary to effect arrest, or to prevent the escape from custody, or to defend himself.” § 87(2)(b) admitted that he was attempting to enter his apartment, though he denied that he knew they were officers. The officer’s statements also indicate that physical force was necessary given that they called for assistance.

Though § 87(2)(b) presented photos of § 87(2)(b)’s injuries, which were sustained during the struggle, § 87(2)(g). PD v. Pusateri (encl. 1d-e) establishes that though a civilian may suffer minor injuries “while failing to cooperate during an arrest is not unusual and, absent other credible evidence, does not demonstrate that excessive force was employed.” § 87(2)(b), § 87(2)(g)

§ 87(2)(b), § 87(2)(g)

§ 87(2)(b), § 87(2)(g)

§ 87(2)(b), § 87(2)(g)

§ 87(2)(b) alleged that Sgt. Nunez pushed her against the wall. Though § 87(2)(b) denied using physical force against the officers, § 87(2)(b) testified that she did push both officers during the struggle. Sgt. Nunez also did not deny pushing § 87(2)(b) to prevent her from interfering with the arrest of § 87(2)(b). Due to the type of struggle that was taking place, § 87(2)(b) was putting herself at risk of being injured. § 87(2)(g)

§ 87(2)(b), § 87(2)(g)

§ 87(2)(b), § 87(2)(g)

Allegation D: Force: Sgt. Osvaldo Nunez struck § 87(2)(b) with a nightstick.

Allegation F: Force: Sgt. Osvaldo Nunez struck § 87(2)(b) with a nightstick.

§ 87(2)(b) alleged that Sgt. Nunez put a nightstick across § 87(2)(b)’s chest, and lifted him so that PO Green can further hit him. She added that Sgt. Nunez hit her on the hand with his nightstick. There was no dispute that Sgt. Nunez and PO Green were in plainclothes. While in plainclothes it would be implausible for officers to carry their nightsticks since it would not be easily concealed. Sgt. Nunez also confirmed that he is not trained in carrying an asp and therefore would not carry an asp with him. Additionally, § 87(2)(b) never alleged that a nightstick was being pressed against his chest. He added that the injury he sustained in his chest, which was depicted in the photo he presented during his testimony, was sustained from Sgt. Nunez grabbing him, which Sgt. Nunez does not dispute. § 87(2)(b), § 87(2)(g)

§ 87(2)(b), § 87(2)(g)

§ 87(2)(b), § 87(2)(g)

§ 87(2)(b), § 87(2)(g)

§ 87(2)(b), § 87(2)(g)

Allegation G: Discourtesy: Sgt. Osvaldo Nunez spoke obscenely and/or rudely to § 87(2)(b)

§ 87(2)(b)

Allegation H: Discourtesy: PO Cedric Green spoke obscenely and/or rudely to § 87(2)(b)

§ 87(2)(b)

§ 87(2)(b) alleged that Sgt. Nunez and PO Green used profanity throughout the incident by calling § 87(2)(b) a “motherfucker.” Though Sgt. Nunez could not recall exactly what was being said during the struggle, he did not deny using profanity while attempting to restrain § 87(2)(b) and believed that PO Green may have used profanity as well.

Past Oath cases have upheld an officer’s right to use profane or forceful language as a means to gain compliance. PD v. Campos, Baquadano, and Gianfrancesco (encl. 1f-h) establishes that even if an officer used harsh language when trying to gain compliance, “such speech, although not ideal, would not constitute punishable misconduct.” § 87(2)(b), § 87(2)(g)

§ 87(2)(b), § 87(2)(g)

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§ 87(2)(b), § 87(2)(g)

§ 87(2)(b), § 87(2)(g)

§ 87(2)(b), § 87(2)(g)

§ 87(2)(b), § 87(2)(g)

Allegation I: Force: Sgt. Osvaldo Nunez pepper sprayed § 87(2)(b)

Based on the evidence provided, it was determined that Sgt. Nunez pepper sprayed § 87(2)(b), § 87(2)(g). Patrol Guide Procedure 212-95 (encl. 1I) indicates that the use of pepper spray may be used “when a member reasonably believes it is necessary to effect an arrest of a resisting suspect, for self-defense or defense of another from unlawful force, or to take a resisting emotionally disturbed person into custody. It will often reduce the potential for injuries to members and suspects that may result from physical restraint and it should be regarded as a possible alternative to such force and restraint, where practical.” § 87(2)(b), § 87(2)(g)

§ 87(2)(b), § 87(2)(g)

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§ 87(2)(b), § 87(2)(g)

§ 87(2)(b), § 87(2)(g)

§ 87(2)(b), § 87(2)(g)

§ 87(2)(b), § 87(2)(g)

Allegation J: Force: Officers used physical force against § 87(2)(b) and § 87(2)(b)

§ 87(2)(b) and § 87(2)(b) alleged that after they were handcuffed and slammed against the wall, they were both punched in the face by uniformed officers. During their interviews, both civilians were unable to provide a description of these officers. § 87(2)(g)

§ 87(2)(b), § 87(2)(g)

§ 87(2)(b), § 87(2)(g)

§ 87(2)(b), § 87(2)(g)

§ 87(2)(b), § 87(2)(g)

§ 87(2)(b), § 87(2)(g)

§ 87(2)(b), § 87(2)(g)

Investigator:

Date:

Supervisor:

Date:

Reviewed by:

Date:

Reviewed by:

Date: